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BRENNAN LECTURE

THE “MARRIAGE GAP”: A CASE FOR STRENGTHENING MARRIAGE IN THE 21ST CENTURY

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In this speech delivered for the annual Justice William J. Brennan, Jr., Lecture on State Courts and Social Justice, Leah Ward Sears, Chief Justice of the Georgia Supreme Court, reflects upon the state and significance of marriage as we head into the twenty-first century. Chief Justice Sears calls attention to social science evidence that shows that the health of the institution of marriage is directly related to the health of our children and communities. Yet today, alarming numbers of children do not have the support of two married parents in the home. Single parenthood, divorce, and cohabitation are at all-time highs, and a great many of these families are failing. Through a review of social science evidence, Chief Justice Sears shows the far-reaching implications that family fragmentation, a potentially self-perpetuating phenomenon, can have for judicial backlog, child well-being, and community health. She unearths an opportunity gap that renders children from fragmented families less likely to succeed and communities where marriage is the exception more prone to violence and crime. Given these dramatic family transformations and their implications, Chief Justice Sears discusses how society, through its laws, should respond. Emphasizing the emotional, financial, and social benefits flowing to children and communities from marriage, Chief Justice Sears suggests dedicating a renewed vigor to exploring ways that law can promote the benefits of marriage. While she cautions that these changes should not be implemented to the detriment

* Copyright © 2007 by Leah Ward Sears. Chief Justice of Georgia. LL.M., 1995, University of Virginia; J.D., 1980, Emory University School of Law; B.S., 1976, Cornell University. I would like to thank Chief Judge Judith S. Kaye, one of the best jurists in the nation today and a woman of integrity, tact, wisdom, and warmth; the Dwight D. Opperman Institute of Judicial Administration of New York University School of Law, an institute providing wonderful leadership as one of our nation's most respected nonpartisan institutions for judicial education; my husband, Haskell Ward, a former deputy mayor of New York City and a man whose gifts of conversation and critique are of great value to me; and those saints, especially my Counsel and Chief of Staff, Tia Milton, who selflessly sacrificed their time and talents to work with me on this project.

of existing legal policies that protect and support children regardless of the family form they are born into, she challenges society to renew its commitment to marriage in this country, thereby manifesting the United States' commitment to principles of equality and opportunity for all children.

INTRODUCTION

I am here to make a case for strengthening marriage in the twenty-first century.

Justice Brennan once said, “[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.”¹ It is this idea—that the law’s strength lies in its adaptability to changing circumstances—that brings me here to advocate for a body of family law that is, above all else, responsive to the changing needs of our time. In my view, such a body of law cannot ignore the wealth of evidence which now demonstrates that the health of our society and our children is directly related to the health of our families.² The reality is that today alarming numbers of children are growing up in this country in families without a mother and a father in the home³—and a great many of these families are failing.⁴ These trends in family formation and fragmentation signal potentially lasting and harmful effects for our children’s and our communities’ well-being.⁵ Thus, we should explore how the law can preserve and expand the protections and benefits marriage promises to our children and communities.

Given the widespread occurrence of family fragmentation in this country, it is the rare person who has not been directly affected by divorce and single parenthood or who does not at least know and care

¹ Justice William J. Brennan, Jr., Speech at Georgetown University: Text and Teaching Symposium (Oct. 12, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 11, 17 (Paul G. Cassel ed., 1986), available at <http://www.fed-soc.org/resources/id.50/default.asp>.

² See *infra* Part IV.

³ See *infra* notes 7–12 and accompanying text.

⁴ See *infra* Part IV.B.

⁵ It is important to note that the retreat from marriage and the increase in father absence is not the sole cause of the negative outcomes for children, such as lower academic achievement, higher risks of poverty, and emotional difficulties, that are discussed in this Lecture. As Sarah McLanahan and Gary Sandefur note in their book, *Growing Up with a Single Parent: What Hurts, What Helps*, although single parenthood, divorce, and cohabitation may increase the risk of these negative outcomes, they are not the only, or necessarily the most significant, cause of them. SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* 2 (1994). Moreover, correlation does not always equal causation. Nevertheless, the wealth of social science evidence makes clear that family form does have an impact on children’s lives. *Id.* at 1.

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about someone who has. As a divorcée, I am sensitive to concerns about judging people without an understanding of how they ended up in their particular situations. Moreover, as a woman who came of age at the height of the feminist movement, I do not hold any naïve notions about the so-called "good old days." I am not advocating a return to an era in which societal stigmas about divorce prevented some women from leaving abusive and oppressive marriages, nor have I ever thought that everyone should get married. To the contrary, it is precisely because of this history that I believe it is critically important that we base our policy judgments in this area on the best empirical data available to us.

Finally, before I go any further, I would like to comment briefly on the scope of this Lecture, particularly as it relates to the subject of same-sex marriage. This topic remains a deeply polarizing one for large numbers of Americans, regardless of their sexual orientation. If I were to stake out a legal position on this subject, my comments would hopelessly overshadow anything else I might say about marriage and family fragmentation. More importantly, it would be inappropriate for me, as a sitting judge, to do so. Therefore, this Lecture addresses the more basic question of whether the law should support marriage as an institution at all. The national debate over same-sex marriage raises a host of important issues, and those issues must ultimately be resolved. But as we struggle to work out a consensus, we must not put off the job of reflecting on marriage as we now have it.

I

THE DECLINE OF MARRIAGE

On October 15, 2006, the *New York Times* published an article⁶—now being criticized⁷—suggesting that for the first time in history, less than half of U.S. households are headed by married couples.⁸ In addition, the Centers for Disease Control and Prevention recently released data showing that about thirty-six percent of children in this country are born to unmarried mothers—the highest percentage ever recorded.⁹ For Hispanic children, the figure is nearly forty-eight per-

⁶ Sam Roberts, *It's Official: To Be Married Means To Be Outnumbered*, N.Y. TIMES, Oct. 15, 2006, at A22.

⁷ See, e.g., Byron Calame, *Can a 15-Year-Old Be a "Woman Without a Spouse?"*, N.Y. TIMES, Feb. 11, 2007, at D12 (criticizing Sam Roberts's article, *supra* note 6, for classifying teenagers between ages of fifteen and seventeen as spouseless women).

⁸ Roberts, *supra* note 6 (reporting that only 49.7% of U.S. households were made up of married couples).

⁹ BRADY E. HAMILTON ET AL., NAT'L CTR. FOR HEALTH STATISTICS, BIRTHS: PRELIMINARY DATA FOR 2005 tbls.1, 2 & 4 (2005), http://www.cdc.gov/nchs/data/hestat/prelim_births05_tables.pdf#1.

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cent; for African American children, the figure is seventy percent.¹⁰ Fathers and fatherhood are being pushed even further into the margins of society.¹¹ Over the past fifty years, divorce has also increased dramatically, with the U.S. divorce rate skyrocketing in the 1960s and 1970s before leveling off, or declining slightly, in recent years.¹² Cohabitation has made a transition from a fringe phenomenon to an increasingly common arrangement for adults, including many adults with children.¹³

When I was a child, I memorized a nursery rhyme that went something like this:

Ginny and Timmy
Sitting in a tree
K-i-s-s-i-n-g
First comes love
Then comes marriage
Then comes a baby in a baby carriage

For me, this rhyme outlined a presumed order that I considered life's normal pattern—a commitment that would be difficult at times, but if I stuck with it, one that would assure security, health, and

¹⁰ *Id.*

¹¹ See, e.g., DAVID POPENOE, *LIFE WITHOUT FATHER* 1 (1996) (“American fathers are today more removed from family life than ever before in our history.”).

¹² Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, CHILD TRENDS RES. BRIEF 2 (2002), available at <http://www.childtrends.org/Files/MarriageRB602.pdf> (“Divorce rates continued to increase into the 1970s and early 1980s, before stabilizing and then declining in the late 1980s and 1990s.” (citing U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 65 tbl.77 (2000))). Some experts suggest that the divorce rate has declined because fewer people are getting married, while others argue that although the divorce rate has declined among better-educated and more affluent couples, it continues to increase among less-educated and poorer couples. David Crary, *Til Death Do U.S. Part*, NW. FLA. DAILY NEWS, May 11, 2007, at A1.

¹³ Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29, 29–30 (2000) (“Cohabitation has grown from a rare and deviant behaviour to the majority experience . . .”). Cohabitation does not necessarily lead to a home with two parents. Evidence shows that by the time children born to a cohabiting couple reach fifteen years of age, seventy-eight percent will have spent time outside of a parental union, compared to only thirty-five percent of children born to married couples. Gunnar Andersson, *Children's Experience of Family Disruption and Family Formation: Evidence from 16 FFS Countries*, 7 DEMOGRAPHIC RES. 343, 353 tbl.5 (2002); see also NAT'L MARRIAGE PROJECT, *THE STATE OF OUR UNIONS 2002: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA* 29 (2002) (“Children living with cohabiting couples tend to be disadvantaged compared to those living with married couples. Prominent reasons are that cohabiting couples have a much higher breakup rate than married couples, a lower level of household income, and a much higher level of child abuse and domestic violence.”); Moore et al., *supra* note 12, at 2 (suggesting that difference in outcomes for children of married couples and children of cohabiting couples is due to fragile nature of cohabiting relationships).

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wealth for me, my husband, our children to come, my community, and my country.

Of course, I always knew that there could be some variation of this pattern and that the sequence wasn't always predictable. Spouses sometimes died, leaving you alone to do the job of child rearing. Sometimes babies came outside of or prior to marriage; sometimes there were relationships with love but no marriage, or marriage but no love. I also knew that some marriages could not—indeed, should not—last six months, let alone a lifetime. But never did I foresee the day when marriage, a historically child-centered relationship,¹⁴ would become adult-centered to a point detrimental to the well-being and eventual development of children, our nation's future.¹⁵ But the numbers, which are staggering, indicate that we are at that point.

Today, more and more children will pass through single-parent homes en route to ever more complex family structures as adults couple and uncouple in both formal and informal ways. From a child's point of view, the concept of family is becoming increasingly fluid and confusing as family relationships become less reliable. Parents, stepparents, and quasi-parents¹⁶ are moving into and out of children's lives in unprecedented numbers. Half-sibling and stepsibling relationships add an additional layer of uncertainty. Each new coupling brings the possibility of rich new family relationships but also the potential for new conflicts, competing loyalties, divided resources, and future emotional losses.¹⁷

¹⁴ In describing marriage as historically child-centered, I mean that marriage has historically been the paradigm through which children were born and reared. See NAT'L MARRIAGE PROJECT, *supra* note 13, at 24 ("Throughout history marriage has first and foremost been an institution for procreation and raising children."). But see STEPHANIE COONTZ, MARRIAGE, A HISTORY 24–31 (2005) (describing various notions of marriage and its central purposes throughout history). Under this framework, parenthood was understood to be an institution oriented around children's need for their mother and father rather than adults' right to children. See ELIZABETH MARQUARDT, THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN'S NEEDS 15–16 (2006) (arguing that law and culture are redefining parenthood into institution focused on adults' right to children).

¹⁵ See *infra* Part IV.B.

¹⁶ By "quasi-parent" I mean an adult who at some point engaged in a romantic relationship with the child's parent and performed at least some of the traditional caretaking responsibilities of a parent.

¹⁷ See, e.g., JUDITH S. WALLERSTEIN, THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY 236–53 (2000) (describing various challenges faced by some stepfamilies); see also McLANAHAN & SANDEFUR, *supra* note 5, at 71 ("[R]emarriage neither reduces nor improves a child's chances of graduating from high school or avoiding a teenage birth."); Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 FUTURE OF CHILD. 75, 81 (2005) (finding that children in stepfamilies sometimes experience difficulties involving jealousy and competing loyalties between stepparent and nonresident biological parent).

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The net result of such dramatic increases in the number of divorces that occur each year and in the proportion of children raised by only one parent is an important family transformation. Although research shows that a stable marriage remains a strong and common aspiration across class, cultural, and racial lines in this country,¹⁸ we are seeing large segments of the American population severely disadvantaged due to the effects of family fragmentation. This marriage gap—cleverly referred to as the “intentional infliction of disadvantage on a child”¹⁹ by one of my hometown columnists—is not only creating inequality among individual families and children,²⁰ but it is also increasingly creating opportunity gaps between communities in which marriage is the normal, usual, and generally reliable framework for raising children, and communities in which marriage has become the exception rather than the rule.²¹

II

FAMILY LAW'S RESPONSE

In family law, as in the rest of American society, there is an intensifying debate about how we should respond to these changes. Should society, through its laws, seek new ways to support and reinvigorate marriage? Or, should family law instead promote more rights and benefits for the alternatives to marriage, such as cohabitation and single parenthood?

Some scholars argue that the law should seek to reinvigorate marriage.²² They argue that law and government should remove bar-

¹⁸ Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage Among the Disadvantaged*, 15 *FUTURE OF CHILD* 117, 119 (2005). See generally Maureen Waller, *High Hopes: Unmarried Parents' Expectations About Marriage at the Time of Their Child's Birth*, 23 *CHILD. & YOUTH SERVICES REV.* 457, 464, 480–81 (2001) (reporting survey findings that “unmarried parents have high hopes about their chances of marriage at the time of their child's birth”).

¹⁹ Jim Wooten, Editorial, *Breakdown of Family Needs Reversing Now*, *ATLANTA J. CONST.*, Jan. 21, 2007, at C6.

²⁰ See *infra* Parts IV.B, V. There are important differences in the resources and outcomes associated with particular types of family structures relevant to individual families. For example, married couples tend to build more wealth, on average, than single or cohabiting couples. W. BRADFORD WILCOX ET AL., *INST. FOR AM. VALUES, WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES* 19 (2005). Moreover, “[t]he economic advantages of marriage stem from more than just access to two incomes. Marriage partners appear to build more wealth for some of the same reasons that partnerships in general are economically efficient, including economies of scale and specialization and exchange.” *Id.*

²¹ See *infra* Part IV.C. For example, in 2000 nearly two-thirds of African American babies were born to unwed mothers. NAT'L MARRIAGE PROJECT, *supra* note 13, at 28.

²² See, e.g., William A. Galston, *Are We Willing to Pay the Price?*, *AM. EXPERIMENT Q.*, Summer 2001, at 59, 61 (arguing that federal government should shift tax code to decrease

riers, such as the marriage penalty in tax and welfare codes,²³ which may discourage marriage.²⁴ They also argue that law and government should encourage marriage by subsidizing marriage education programs, by referring couples contemplating divorce to intervention counseling, and by conducting media campaigns that emphasize the personal, social, and economic benefits of raising children within a healthy marriage.²⁵ There is also some support for measures that would discourage divorce, such as a call for a return to fault-based divorce schemes.²⁶

At the other end of the debate, some scholars argue that "the traditional marriage-and-family paradigm imposes an ethnocentric 'benchmark' or 'ideal.' This paradigm, they say, does not speak to the

burden on families with minor children); Isabel V. Sawhill, *Reversing Teen Pregnancy and Single Parenthood*, AM. EXPERIMENT Q., Summer 2001, at 77, 80 (proposing tax bonus as incentive to "in-wedlock child bearing").

²³ See Adam Carasso and C. Eugene Stuerle, *The Hefty Penalty on Marriage Facing Many Households with Children*, 15 FUTURE OF CHILD. 157 (2005), for an explanation of the marriage penalty in federal tax and transfer policies. A marriage penalty occurs when a couple's combined social welfare benefits, less taxes, are lower if the couple is married than they would be if the couple filed taxes as two single individuals. *Id.* at 159.

²⁴ Carasso and Stuerle note that some researchers have found that "tax penalties slightly discourage marriage," while others have found no significant effect. *Id.* at 161. They do acknowledge, however, the difficulty in measuring behavioral effects on specific marriage penalties or subsidies, and also that the 2001 federal tax legislation did reduce marriage penalties and generated subsidies for some married couples. *Id.* at 161-62; see Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 301-302, 115 Stat. 38, 53-57, (eliminating marriage penalty in some tax brackets).

²⁵ See, e.g., INST. FOR AM. VALUES ET AL., THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES 23 (2000), available at <http://americanvalues.org/pdfs/marriagemovement.pdf> (calling for federal, state, and local governments to subsidize marriage education, "highlight public health and other benefits of marriage," and "reform court-connected divorce education and mediation programs"); M. Robin Dion, *Healthy Marriage Programs: Learning What Works*, 15 FUTURE OF CHILD. 139 (2005) (reviewing various marriage and relationship education programs); Edin & Reed, *supra* note 18, at 128 (advocating public campaigns that provide information about "benefits to children of being raised in a household with both biological parents as well as about the harmful effects of violent or high-conflict relationships on child well-being"); Robert Rector, *Using Welfare Reform to Strengthen Marriage*, AM. EXPERIMENT Q., Summer 2001, at 63, 63-65 (advocating marriage education programs, public education advertising campaigns, marriage mentoring programs, and divorce education programs as means of reducing the rates of divorce and nonmarital childbearing).

²⁶ See, e.g., David Blankenhorn, *A City with Foundations*, AM. EXPERIMENT Q., Summer 2001, at 92, 94-95 (supporting reinstatement of fault-based divorce laws); Katherine Shaw Spaht, *How Law Can Reinvigorate a Robust Vision of Marriage and Rival Its Post-Modern Competitor*, 2 GEO. J. L. & PUB. POL'Y 449, 452-53 (2004) (arguing that fault-based divorce schemes articulated public's expectations as to how spouses should behave toward one another); cf. McLANAHAN & SANDEFUR, *supra* note 5, at 145 (arguing that more restrictive divorce laws may have unintended effect of making couples more reluctant to marry).

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experience of racial minorities, women, single parents, divorced and remarried persons, gays and lesbians, and others.”²⁷

These family diversity²⁸ proponents have some powerful supporters. For example, some of the eminent scholars of the American Law Institute (ALI), a prestigious association of active and retired judges and lawyers of which I am currently a member, embraced this view in their 2002 report, *Principles of the Law of Family Dissolution*.²⁹ The ALI report is designed, in part, to clarify the various states’ patchwork of family law.³⁰ According to the ALI, a central purpose of family law should be to protect and support family diversity.³¹ The report views “traditional marriage” as merely one of many possible and equally valid family forms.³² It also downplays the central role of biological and adoptive parenthood³³ in family law and instead focuses on the idea of “de facto parenthood” and “parenthood by estoppel,”³⁴ allowing stepparents and ex-cohabitants who have

²⁷ DAN CERE, INST. FOR AMERICAN VALUES, INST. FOR MARRIAGE AND PUB. POLICY & INST. FOR THE STUDY OF MARRIAGE, LAW AND CULTURE, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* 8 (2005).

²⁸ Although there is no one authoritative definition for “family diversity,” I understand it to describe the diverse structures, types, and situations in which families live in modern society.

²⁹ Lance Liebman, *Director’s Foreword* to AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS*, at xv, xv (2002) [hereinafter *PRINCIPLES*] (arguing that *Principles* “offers a legal framework that can accommodate the different choices people make and the different expectations they bring to their family relationships”).

³⁰ See Ira Mark Ellman, *Chief Reporter’s Foreword* to *PRINCIPLES*, *supra* note 29, at xvii, xvii (“The goal was necessarily a statement of Principles and Commentary that go beyond aspiration to promote, in the words of the Institute’s charter, the law’s ‘clarification,’ its ‘better adaptation to social needs,’ and its securing of ‘the better administration of justice.’” (quoting Am. Law Inst. Charter *available at* www.ali.org/doc/charter.pdf)).

³¹ See *PRINCIPLES*, *supra* note 29, at 6 (stating that one of *Principles*’ goals was to create legal framework that “preserve[s] the diversity in parenting arrangements within families”).

³² See Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partnership Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353, 354 (praising *Principles* for taking “an important step in the right direction of making marriage matter less”); Spaht, *supra* note 26, at 454–55 (“[T]he three Reporters for the project describe in notes and commentary their vision of marriage as . . . simply one of a variety of intimate and close relationships.”).

³³ The ALI report does acknowledge that adoption is the preferred mechanism for legal recognition of nonbiological parent-child relationships. See, e.g. *PRINCIPLES*, *supra* note 29, at § 2.03 cmts. b(iii), c (advocating adoption in context of parent by estoppel and de facto parent). Indeed, adoption is a highly admirable practice with enormous benefits for society.

³⁴ The term “de facto parent” in this context refers to:

an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, (i) lived with the child, and (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a

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shared caretaking responsibilities with a legal parent to continue taking part in the child's life after the relationship with the legal parent has dissolved.³⁵

The point I'd like to highlight is this: Regardless of where you fall along this spectrum, our response to this new debate on marriage has important implications for cherished American ideals concerning family, equality of opportunity, and the health and well-being of our children. Unfortunately, few people seem awake to the consequences, or even the existence, of this revolution in family law.³⁶ What is needed, therefore, is more public attention to the nature and purpose of marriage. We must add this issue to the national legal discourse.

complete failure or inability of any legal parent to perform caretaking functions, (A) regularly performed a majority of the caretaking functions for the child, or (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

Id. § 2.03(1)(c). The term "parent by estoppel" refers to:

an individual who, though not a legal parent, (i) is obligated to pay child support . . . or (ii) lived with the child for at least two years and (A) over that period had a reasonable, good-faith belief that he was the child's biological father, based on marriage to the mother or on the actions or representations of the mother, and fully accepted parental responsibilities consistent with that belief, and (B) if some time thereafter that belief no longer existed, continued to make reasonable, good-faith efforts to accept responsibilities as the child's father; or (iii) lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests; or (iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as a parent is in the child's best interests.

Id. § 2.03(1)(b).

³⁵ *Id.* at 5 (identifying maintenance of continued contact with children by de facto parents as goal of law); see also Robin Fretwell Wilson, *Undeserved Trust: Reflections on the American Law Institute's Treatment of De Facto Parents*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S "PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION" 90, 90-91 (Robin Fretwell Wilson ed., 2006) [hereinafter RECONCEIVING THE FAMILY] (criticizing ALI's assumption that continuing contact between child and de facto parent is "unadulterated good").

³⁶ See Spaht, *supra* note 26, at 449-54, for a discussion of the revolution in family law. Spaht argues that the law has deregulated the institution of marriage over the last century by loosening the rules for ending marriages and by "eliminating the internal legal regulation of the content of marriage and the legal barriers erected for its protection." *Id.* at 449. In my opinion, there have been revolutions in both family law and in family arrangements. The revolution in family law was, in part, ushered in by the widespread elimination of fault-based divorce schemes and other regulations related to marriage over the last century. *Id.* This change in the law precipitated the revolution in the ways that families form and structure themselves, which is now spurring new debates concerning the law's treatment of marriage and its possible alternatives.

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THE LIMITS OF FORMAL LEGAL PROTECTION

Marriage in the United States has always been a legal institution.³⁷ However, marriage cannot be *solely* reduced to a legal construct like, for example, a corporation,³⁸ because for many Americans, marriage is also a deeply spiritual and sacred bond.³⁹ Thus, marriage is a hybrid institution: an intimate, intensely private, and personal decision to enter a public legal status that has special meaning in broader civil society.

Marriage provides a variety of advantages for children not created by law but inherent in the institution itself.⁴⁰ For example, children who grow up in stable, two-parent families “have a higher standard of living, receive more effective parenting, experience more cooperative co-parenting, are emotionally closer to both parents, and are subjected to fewer stressful events and circumstances.”⁴¹

Because much of the protection marriage provides is inherent in the institution itself, there are limits to the capacity of law to equalize the outcomes of all family forms. The law may declare, for example, that children have the same right to a father’s care regardless of whether they are being raised inside or outside of a marriage. This is a good thing—all children deserve the support and care of their fathers. However, while the law may insist that a father financially support his children regardless of his connection to their mother, it cannot mandate the love, protection, and support intrinsically present in a healthy marriage. A child support check mandated by law is important, but it cannot replace a loving father, or a committed, responsible, and present husband. As a result, the equality of legal treatment assured to all children, regardless of whether they are born inside or outside of marriage,⁴² does not protect millions of American

³⁷ Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349, 356–57 (2007) (arguing that although marriage was not always considered to be Christian, religious institution, it has always been treated in American law as civil contract).

³⁸ INST. FOR AM. VALUES & INST. FOR MARRIAGE AND PUB. POLICY, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 22–23 (2006).

³⁹ See COONTZ, *supra* note 14, at 161–76 (describing nineteenth-century rise of marriage as intimate and sentimental union in North America).

⁴⁰ WILCOX ET AL., *supra* note 20, at 19–32 (describing economic, psychological, emotional, and social advantages of marriage).

⁴¹ Amato, *supra* note 17, at 75.

⁴² See, e.g., *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (holding, under Equal Protection Clause of Fourteenth Amendment, that child could not be denied parental support from his natural father simply because child had been born out of wedlock); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972) (“Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of

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children from the social and economic inequality often produced by fragmented families.⁴³ Thus, the law is not the creator of family. Rather, it is one of its many custodians.⁴⁴

Nevertheless, the law of marriage matters because it is influenced by, and in turn influences, other, more powerful entities in civil society, such as families, faith communities, and civic institutions.⁴⁵ These institutions do much of the hard work of raising young men and women who aspire to marriage for themselves and who learn to respect and support the marriage bond of others.⁴⁶ Moreover, the evidence is strong and growing that marriage is an important generator of human, social, and financial capital.⁴⁷ Children from families, neighborhoods, communities, ethnic groups, or social classes in which marriage is common have powerful advantages⁴⁸ over children from communities in which marriage is no longer the normal paradigm for having and raising children.

To ignore the decline of marriage, therefore, not only puts individual children at risk, but it also sets in motion a self-perpetuating cycle of disadvantage as children who grow up in single-parent, divorced, and cohabiting households establish similar households for their own children.⁴⁹

detering the parent. . . . [T]he Equal Protection Clause . . . enable[s] us to strike down discriminatory laws relating to status of birth").

⁴³ See *infra* Part IV.B.

⁴⁴ See Sara Butler Nardo, *De Facto Parenthood: The Reformer's Latest Unwholesome Innovation in Family Law*, WKLY. STANDARD (Wash.), Mar. 6–13, 2006, at 21 (implying that law can undercut social institutions like family and marriage by recognizing alternatives, such as de facto parenthood, that may harm children).

⁴⁵ See LINDA McCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 52–53 (2006) (suggesting that families foster in children qualities such as civility and respect for others, which are essential elements of self-government in civil society).

⁴⁶ *Id.*

⁴⁷ *Id.* Social capital refers to the interpersonal "connections among individuals" and "the norms of reciprocity of trustworthiness that arise from them." ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2000); see also McLANAHAN & SANDEFUR, *supra* note 5, at 3 ("Social capital is an asset that is created and maintained by relationships of commitment and trust. It functions as a conduit of information as well as a source of emotional and economic support, and it can be just as important as financial capital in promoting children's future success.").

⁴⁸ See *infra* Part IV.

⁴⁹ See E. MAVIS HETHERINGTON & JOHN KELLY, *FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED* 240–47 (2002) (noting that children of divorced parents face real risks that their own marriages will fail but also acknowledging complexity of other contributing factors).

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IV THE COSTS OF FAMILY FRAGMENTATION

How costly has the retreat from marriage been? Let me give you a glimpse of the recent typhoon of alarming statistics from three different vantage points: the courts, child well-being measures, and community health.

A. *Family Fragmentation and the Courts*

As a judge in the Georgia court system with more than twenty-five years of experience at almost every level of court, I know firsthand the administrative and judicial costs of family breakdown. In my state, sixty-five percent of all civil cases heard at the trial court level in 2004 involved issues concerning children and families.⁵⁰ More than 25,000 children in Georgia were admitted to a Regional Youth Detention Center in 2006,⁵¹ and another 12,858 children were in the care of the Georgia Division of Family and Children Services.⁵² In 2005, the Georgia Office of Child Support Enforcement had a case for one in every four Georgia children, with a total caseload surpassing the half-million mark.⁵³ Of these child support enforcement cases, seventy-two percent—more than 350,000 current cases—involved a support order made in superior court.⁵⁴

Georgia is not unique in this respect. Family fragmentation is a significant factor contributing to judicial backlog and overstretched

⁵⁰ JUDICIAL COUNCIL OF GA., 2005 ANNUAL REPORT: GEORGIA COURTS, JULY 1, 2004–JUNE 30, 2005, at 8–9 (2005), available at <http://www.georgiacourts.org/aoc/publications/ar2005.pdf>. Comprising nearly two-thirds of all civil cases, these family-related matters also exceed the number of all felony and misdemeanor criminal cases combined. *Id.*

⁵¹ Ga. Dep't of Juv. Just., Annual Statistics, <http://www.djj.state.ga.us/ReferenceLibrary/refStatistics.shtml> (last visited June 17, 2007). Regional Youth Detention Centers provide short-term housing “for youths awaiting trial in Juvenile or Superior Court, or placement elsewhere within the [Department of Juvenile Justice] system.” Ga. Dep't of Juv. Just., Facilities & Programs, <http://www.djj.state.ga.us/FacilitiesPrograms/Overview.shtml> (last visited June 17, 2007).

⁵² Adoption and Foster Care Analysis and Reporting System, Data Reports—Georgia, Summary Measures: Children in Foster Care During April 2006 Through March 2007, http://fosteringcourtimprovement.org/ga/County/incare_summary.html (last visited June 2, 2007). The Georgia Division of Family and Children Services investigates allegations of child abuse; finds foster homes for abused and neglected children; assists with childcare costs for low-income parents who are working or are in job training; and provides various other support services to assist troubled families. Ga. Div. of Family and Child Services, <http://dfcs.dhr.georgia.gov/portal/site/DHR-DFCS/> (last visited June 2, 2007).

⁵³ OFFICE OF CHILD SUPPORT ENFORCEMENT, GA. DEP'T OF HUMAN RESOURCES, CHILD SUPPORT IN REVIEW: FY 2005, at 2(2005), available at http://ocse.dhr.georgia.gov/DHR-OCSE/DHR-OCSE_Home/OCSE%20Review%20fy%202005.pdf.

⁵⁴ *Id.*

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budgets in courts all over the country.⁵⁵ The flood of domestic relations cases that judges deal with on a daily basis is, however, the least of the costs associated with high rates of family fragmentation.

B. Family Fragmentation and Child Well-Being

Family fragmentation has also had a tremendous impact on child well-being. Advocates who embrace family diversity as the goal of family law say they are only responding to reality—the facts on the ground.⁵⁶ But one of the facts on the ground that law and society must respond to is this: A growing body of scientific evidence demonstrates that children suffer when families fall apart or fail to form in the first place. If all family forms were equally likely to protect children, protecting the rights of adults to form families of their choosing might be a noble goal for family law. Instead, forty years of social science evidence now confirms that

family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor [academic and behavioral] outcomes⁵⁷

To be sure, most single mothers, single fathers, divorcées, and cohabitants work hard to raise decent, successful children, and most succeed⁵⁸ despite additional difficulties. But along the way, the data from social science now shows that their children must often overcome increased risks of poverty,⁵⁹ educational failure,⁶⁰ child abuse,⁶¹

⁵⁵ See RICHARD Y. SCHAUFFLER ET AL., EXAMINING THE WORK OF STATE COURTS, 2005: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 55–63 (2006) (finding that state courts reported 2.1 million incoming juvenile cases in 2004, whereas only fourteen of thirty-four states reported juvenile clearance rates of one hundred percent).

⁵⁶ See Liebman, *supra* note 29, at xv (“[T]he Principles are sensitive to both the traditional value systems within which most families are formed and the nontraditional realities and expectations of other families”).

⁵⁷ Moore et al., *supra* note 12, at 6.

⁵⁸ See *id.* at 1 (“The majority of children who are not raised by both biological parents manage to grow up without serious problems, especially after a period of adjustment for children whose parents divorce.”); Judith S. Wallerstein, *Children of Divorce: Report of a Ten-Year Follow-Up of Early Latency-Age Children*, 57 AM. J. ORTHOPSYCHIATRY 199, 210 (1987) (finding, in ten-year follow-up to study focusing on children who were eight years old or younger when their parents divorced, that most children were law-abiding people attending school full time, living at home, and holding part-time jobs).

⁵⁹ See, e.g., Teresa A. Mauldin, *Women Who Remain Above the Poverty Level in Divorce: Implications for Family Policy*, 39 FAM. REL. 141, 141, 144 (1990) (noting that numerous studies have found that marital disruption has detrimental economic effects on women and their children and finding that job training and health status differentially affect per capita income post-disruption); Sara McLanahan, *Family, State, and Child Well-*

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delinquency,⁶² emotional distress, and mental illness.⁶³ And, although

Being, 26 ANN. REV. SOC. 703, 703 (2000) (“Nonmarital childbearing, a trend that now affects one of three children born in the United States, undermines children’s claims on fathers’ resources (time and money). . . . These changes disproportionately affect families at the lower end of the income distribution, who have the highest rates of nonmarital childbearing”); Moore et al., *supra* note 12, at 1 (“Children born to unmarried mothers are more likely to be poor”); Pamela J. Smock et al., *The Effect of Marriage and Divorce on Women’s Economic Well-Being*, 64 AM. SOC. REV. 794, 794, 796 (1999) (noting that “women experiencing separation or divorce typically undergo marked declines in family income” but also finding that “women who divorce might not do as well economically if they had remained married as do those who in fact remain married”).

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⁶⁰ See, e.g., McLANAHAN & SANDEFUR, *supra* note 5, at 4–5, 71 (suggesting that income loss and residential mobility—which may result from family disruption—threaten child’s educational performance, but noting that “remarriage neither reduces nor improves a child’s chances of graduating from high school or avoiding a teenage birth”); Paul R. Amato, *Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis*, 15 J. FAM. PSYCHOL. 355, 362, 363 tbl.3 (2001) (finding relatively strong effects of divorce on academic achievement of children in 1950–79, and then weaker but still significant effects in 1980s and 1990s); William H. Jaynes, *The Effects of Several of the Most Common Family Structures on the Academic Achievement of Eighth Graders*, 30 MARRIAGE & FAM. REV. 73, 89–90 (2000) (finding that while death of parent negatively impacts child academic achievement, remarriage of living parent considerably worsens child’s academic achievement and that child with never-married single parent was at greatest risk for declines in academic achievement, but that cohabitation exacerbates those effects).

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⁶¹ See, e.g., Martin Daly & Margo Wilson, *Child Abuse and Other Risks of Not Living with Both Parents*, 6 ETHOLOGY & SOCIOBIOLOGY 197, 205 (1985) (reporting direct evidence of substantial elevation in risk of child abuse for children not living with two natural parents and especially for children living with stepparent); Leslie Margolin, *Child Abuse by Mothers’ Boyfriends: Why the Overrepresentation?*, 16 CHILD ABUSE & NEGLECT 541, 548 (1992) (showing that “although mothers’ boyfriends perform comparatively little child care, they are responsible for more child abuse than any other nonparental caregivers”); Aruna Radhakrishna et al., *Are Father Surrogates a Risk Factor for Child Maltreatment?*, 6 CHILD MALTREATMENT 281, 286 (2001) (finding that presence of nonbiological father figure in home is significant predictor of future child maltreatment report and that presence of both biological parents in home is associated with lowest risk of maltreatment report); Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251, 263 (2001) (“Numerous studies have reported that young girls living without one of their natural parents are at greater risk of sexual abuse, both from family members and those outside the family.” (citations omitted)).

⁶² See, e.g., Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. RES. ON ADOLESCENCE 369, 388–93 (2004) (showing that youth incarceration risks were elevated for adolescents in father-absent households).

⁶³ See, e.g., HETHERINGTON & KELLY, *supra* note 49, at 111–17, 124–26, 149–58 (describing risk factors for emotional problems among children of divorced parents at two and six years following divorce); WALLERSTEIN, *supra* note 17, at xxiv (discussing negative effects of divorce on children of divorced parents’ emotional and intimate relationships as adults); Amato, *supra* note 60, at 363 (presenting data that suggests “the gap in emotional adjustment between children with divorced and continuously married parents was wider in the 1990s than at any earlier time”). See generally ELIZABETH MARQUARDT, BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE (2005) (presenting statistics about, and stories of, children whose parents divorced, reflecting emotional distress and pressures).

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the absence of two incomes in the household is a major factor in a child's lower academic, social, and emotional achievement in single-parent homes,⁶⁴ at least one study indicates that it only accounts for about half of the disadvantage.⁶⁵ Most of the remaining disadvantage is due to inadequate parental guidance and attention and weak ties to community resources.⁶⁶

Indeed, one of the truly disturbing consequences of family fragmentation is the way it interacts with other important generators of human and social capital to reduce children's longterm opportunities. For example, sociologists Sara McLanahan and Gary Sandefur studied the relationship between family structure and child well-being and concluded that children whose parents fail to marry or stay married are twice as likely to drop out of high school, even after controlling for family background.⁶⁷ Similarly, in 2001 sociologist Paul Amato analyzed sixty-seven studies related to children's academic achievement from the previous decade and concluded that children with divorced parents garner lower levels of success at school than children with continuously married parents.⁶⁸ "Indeed, the gap in well-being between the two groups of children appears to have grown larger during the last decade."⁶⁹

Author James Baldwin once wrote, "Children have never been very good at listening to their elders, but they have never failed to imitate them."⁷⁰ When I think about what has happened to the American family in the fifty-one years of my lifetime; when I consider that as many as twenty-two million children today live with only one parent; and when there is no escaping the fact that the suffering caused by family fragmentation continues to be handed down from one generation to the next, James Baldwin's words ring agonizingly true.

⁶⁴ McLANAHAN & SANDEFUR, *supra* note 5, at 1–3.

⁶⁵ *Id.* at 3.

⁶⁶ *Id.*

⁶⁷ *Id.* at 2. This study compared teenagers of similar background who grew up with their biological parents in the home against teenagers who lived apart from their parents during some part of their childhood. *Id.* at 2, 4. The authors reached their conclusion even after controlling for parents' race, educational background, marital status at the time of the child's birth, and whether the custodial parent remarried. *Id.* at 1.

⁶⁸ Amato, *supra* note 60, at 358, 362, 363 tbl.3.

⁶⁹ *Id.* at 366.

⁷⁰ James Baldwin, *NOBODY KNOWS MY NAME: MORE NOTES OF A NATIVE SON* 61–62 (1961).

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C. Family Fragmentation and Community Health

Inequalities between fragmented and intact families, and the implications of these inequalities, extend beyond individual children and families. These inequalities also create opportunity gaps among communities.⁷¹

1. Poverty

“The spread of single-mother families has played a major role in the persistence of poverty. In 1964, when President Lyndon Johnson declared war on poverty, only 30 percent of poor families with children were headed by single mothers.”⁷² Today, about sixty percent of poor families are single-mother families.⁷³ A 2002 Brookings Institution study suggests that if rates of single motherhood had remained constant between 1970 and 1998, the child poverty rate would have dropped by one-fifth.⁷⁴ But in the year 2000, eight percent of all children in married couple families were poor, compared to forty percent of children in families headed by single women.⁷⁵ Among African American children, eight percent of children in married-couple families were poor (the same as the national average), but forty-nine percent of African American children living in households headed by single women were living in poverty.⁷⁶

Yet the trends extend beyond just single parenthood. More than half of all children raised outside of intact, married families now experience at least one year of “dire poverty,” defined as a family income of less than half the official poverty rate.⁷⁷

⁷¹ See McLANAHAN & SANDEFUR, *supra* note 5, at 116–33 for further explanation of the relationship between fragmented families and children’s lack of access to community resources and connections.

⁷² David T. Ellwood & Christopher Jencks, *The Spread of Single-Parent Families in the United States Since 1960*, at 2 (Harvard Univ. John F. Kennedy Sch. of Gov’t, Faculty Research Working Paper Series, Paper No. RWP04-008, 2004), available at <http://ksgnotes1.harvard.edu/Research/wpaper.nsf/pubwzAuthor> (go down the list of authors to David T. Ellwood; click on his name then select the article).

⁷³ *Id.*

⁷⁴ Adam Thomas & Isabel Sawhill, *For Richer or for Poorer: Marriage as an Anti-poverty Strategy*, 21 J. POL’Y ANALYSIS & MGMT. 587, 594 (2002).

⁷⁵ Robert Haveman et al., *Trends in Children’s Attainments and Their Determinants as Family Income Equality Has Increased*, in SOCIAL INEQUALITY 149, 158 tbl.4.3 (Kathryn M. Neckerman ed., 2004). This study, however, did not address the relationship between single-father families and poverty. *Id.*

⁷⁶ *Id.*

⁷⁷ Mark R. Rank & Thomas A. Hirschl, *The Economic Risk of Childhood in America: Estimating the Probability of Poverty Across the Formative Years*, 61 J. MARRIAGE & FAM. 1058, 1064 (1999) (finding that eighty-one percent of children living in non-married households will experience poverty before age of seventeen, compared with just twenty-two percent of children raised by married parents; of those children living in non-married

In her book *Marriage and Caste in America*, Kay Hymowitz points out this startling fact: Although ninety-two percent of children whose families make at least \$75,000 a year are living with both of their married parents, only twenty percent of children in families earning less than \$15,000 a year live with both parents.⁷⁸ It is obvious, then, that there exists at least a strong correlation, and perhaps even a causal relationship, between marriage, wealth creation, and poverty reduction.

2. *Crime*

Community crime rates are also linked to family structure.⁷⁹ In fact, sociologist Robert Sampson argues that "[f]amily structure is one of the strongest, if not the strongest, predictor of variations in urban violence across cities in the United States."⁸⁰ A study analyzing violent crime rates between 1973 and 1995 found that nearly ninety percent of the change in violent crime rates can be accounted for by the change in percentages of out-of-wedlock births.⁸¹ Another study, exploring the relationship between family structure and the crime rates in rural counties in four states, concluded that "[h]igher levels of family disruption, as indexed by the population of female-headed

households, fifty-two percent will experience dire poverty); *see also* Suzanne M. Bianchi et al., *The Gender Gap in the Economic Well-Being of Nonresident Fathers and Custodial Mothers*, 36 *DEMOGRAPHY* 195, 201 (1999) (finding that in twelve months after disruption, where children remain with mothers, fathers enjoy levels of financial well-being twice as high as their former wives or children); Mary Naifeh, *Dynamics of Economic Well-Being, Poverty 1993-94: Trap Door? Revolving Door? Or Both?* [U.S. Bureau of the Census, Current Population Reports: Household Economic Studies], at 2 (July 1998), available at <http://www.bls.census.gov/sipp/p70s/p70-63.pdf> (showing people in families with single-female-headed households had higher poverty rate than did people in either married-couple families or unrelated individuals).

⁷⁸ KAY S. HYMOWITZ, *MARRIAGE AND CASTE IN AMERICA: SEPARATE AND UNEQUAL FAMILIES IN A POST-MARITAL AGE* 22 (2006).

⁷⁹ Crime rates in the last few decades can, of course, also be correlated to a variety of other factors in addition to family structure, such as poverty, teen motherhood, low education, urban residence, drug use, and racial inequalities. *See* Todd Michael Franke, *Adolescent Violent Behavior: An Analysis Across and Within Racial/Ethnic Groups*, 8 *J. MULTICULTURAL SOC. WORK* 47, 64 (2001) (finding that poverty and neighborhood context may contribute to risks of adolescent delinquency); Harper & McLanahan, *supra* note 62, at 380 (finding that poverty, teen motherhood, low education, urban residence, and racial inequalities may contribute to risks of youth incarceration).

⁸⁰ Robert J. Sampson, *Unemployment and Imbalanced Sex Ratios: Race Specific Consequences for Family Structure and Crime*, in *THE DECLINE IN MARRIAGE AMONG AFRICAN AMERICANS* 229, 249 (M. Belinda Tucker & Claudia Mitchell-Kernan eds., 1995).

⁸¹ *See* Wade C. Mackey & Nancy S. Coney, *The Enigma of Father Presence in Relationship to Sons' Violence and Daughters' Mating Strategies: Empiricism in Search of a Theory*, 8 *J. MEN'S STUDIES* 349, 352 (2000) ("[Between 1987 and 1993, l]evels of out-of-wedlock births were consistently and strongly related to rates of violent crime. Rates of male unemployment were not consistently related to rates of violent crime.").

households, were strongly and consistently associated with higher rates of arrest for violent offenses other than homicide.”⁸²

Moreover, studies now show that adolescents raised in single-parent families are more likely to engage in delinquent or adult criminal behavior than are adolescents raised in two-parent families.⁸³ Indeed, while approximately 7.5% of all young men are incarcerated at some point between the ages of fifteen and thirty,⁸⁴ those raised in single-parent homes are twice as likely to be incarcerated, and those in stepparent families are more than three times as likely to be incarcerated.⁸⁵

⁸² D. Wayne Osgood & Jeff M. Chambers, *Social Disorganization Outside the Metropolis: An Analysis of Rural Youth Violence*, 38 *CRIMINOLOGY* 81, 103 (2000); see also Robert M. O'Brien & Jean Stockard, *The Cohort-Size Sample-Size Conundrum: An Empirical Analysis and Assessment Using Homicide Arrest Data from 1960 to 1999*, 19 *J. QUANTITATIVE CRIMINOLOGY* 1, 30 (2003) (“The results of our analyses strongly support the conclusion of the importance . . . of non-marital births on cohorts’ risk of homicide offending independent of the age and period. This effect appears to have gotten stronger over time.”).

⁸³ See Franke, *supra* note 79, at 62–63 (finding that family structure was “an important predictor of the presence, severity, and maintenance of youth violence, drug use, and conduct disorders”). Some sociologists point to “social disorganization theory” as a possible explanation for the correlation between family structure and community crime rates. The essence of social disorganization theory is the idea that in communities with high rates of single-parent families, there are not enough adults present to supervise the behavior of adolescents, so delinquent behavior is allowed to flourish. Amy L. Anderson, *Individual and Contextual Influences on Delinquency: The Role of the Single-Parent Family*, 30 *J. CRIM. JUST.* 575, 576 (2002). Anderson studied the correlation between family structure and delinquency among adolescents and found that children raised in communities with high percentages of two-parent families, including biological and stepfamilies, were less likely to commit delinquent acts than children raised in single-parent families. Interestingly, Anderson found that there was both “an individual- and aggregate-level relationship between family structure and delinquency.” *Id.* at 585. Anderson further found that “[a]n important thing to notice about the results is that it matters how many single-parent families a student is exposed to, regardless of whether the student has one or two parents in the home.” *Id.* But see Harper & McLanahan, *supra* note 62, at 390 (finding that children in stepparent families faced even higher chances of incarceration during their youth than children raised in single-parent households).

⁸⁴ Harper & McLanahan, *supra* note 62, at 376 tbl.1.

⁸⁵ *Id.* at 386, 387 tbl.4 (finding that youths in stepparent families were 3.2 times more likely to be incarcerated than youths in households in which child’s biological parents were married, and youths in single-parent families were 2.0 times more likely to be incarcerated than youths in households in which child’s biological parents were married, even after controlling for factors such as mother’s education, race, whether mother gave birth to child as teenager, unemployment, region, urban environment, and median family income).

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WHY MARRIAGE MATTERS

As leading marriage and family scholars noted in a recent report, "Marriage is not a panacea for all of our social ills."⁸⁶ And, of course, not all marriages result in positive outcomes for children. Violent or abusive marriages are worse for children than no marriage at all. "But whether American society and, indeed, the world, succeeds or fails in building a healthy marriage culture is clearly a matter of legitimate public concern. . . . [M]arriage is an issue of paramount importance if we wish to help the most vulnerable members of our society: the poor, minorities, and children."⁸⁷

On average, marriage brings together the emotional, psychological, spiritual, financial, and educational resources of two parents and their respective kin networks. As noted previously, children who grow up in stable families with their own continuously married parents "have a higher standard of living, receive more effective parenting, experience more cooperative co-parenting, are emotionally closer to both parents, and are subjected to fewer stressful events and circumstances"⁸⁸ than their peers in alternative family forms. For many fathers, for example, the level of emotional⁸⁹ and financial investment in their children is closely related to their relationship with their children's mothers.⁹⁰ Professors Ellwood and Jencks point out the obvious when they write:

Few fathers want to devote a large share of their income to supporting children they do not live with, especially when the money actually goes to their former wife or girlfriend. Furthermore, even the most generous fathers cannot do as much to support their children when they have to maintain another household as when they live in the child's household.⁹¹

⁸⁶ WILCOX ET AL., *supra* note 20, at 9.

⁸⁷ *Id.*

⁸⁸ Amato, *supra* note 17, at 75.

⁸⁹ See Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 848, 862, 869 (2005) (analyzing study that showed that biological fathers in cohabiting relationships with their children's biological mothers spent less time, on average, with their children than did biological fathers who were married to their children's mothers).

⁹⁰ David T. Ellwood & Christopher Jencks, *The Uneven Spread of Single-Parent Families: What Do We Know? Where Do We Look for Answers*, in SOCIAL INEQUALITY, *supra* note 75, at 3, 8 (arguing that biological fathers often do not want to or cannot make a large contribution to supporting children when they do not live with them).

⁹¹ *Id.*

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Just like partners in business, partners in marriage actually produce more working together than either can produce separately.⁹² Family fragmentation reverses that process, decreasing the resources and relationships available to care for children, while creating new adult emotional and financial challenges that inevitably compete with children's needs.

A marriage culture also affects the sexual behavior of young people by transmitting a powerful message, which is this: Before you have children, you ought to first find a mate who is willing to commit to you, and only you; to pledge sexual faithfulness to you, and only you; to share his or her worldly goods with you, and only you; and to have children with you, and only you. We all know, and many of us from personal experience—I am a divorcée myself—that marriage does not always follow this path. Yet as a mechanism for signaling to young people the right time and the right person with whom to have a baby, marriage has no peer, or even close substitute.

Many voices in our society now suggest that the nuclear family is not a natural construct but rather an ideological construct, just one of many equally valid ways of structuring family life.⁹³ And they are right about one thing: Marriage is not natural in the sense of being inevitable, no matter what we say, or do, or teach our children. Furthermore, the primary mechanism by which marriage protects children is not through its array of attendant legal benefits. If this were the case, children whose parents remarry would do just as well as children in intact marriages, and sadly they do not.⁹⁴

Marriage is the best antipoverty program we have. We must, therefore, protect it. Like a college degree, marriage is in deep danger of becoming part of the structure of class privilege in America rather than the common inheritance of all our children. We cannot let that happen. Without a conscious, combined effort on the part of our legal system, government, educators, faith communities, civic leaders, and others, such inequality is likely to become more and more entrenched as family breakdown perpetuates itself through various generations.

CONCLUSION: MARRIAGE PLUS, NOT MARRIAGE ONLY

There is little question that our social and legal policies should continue to direct substantial energies toward providing protection

⁹² See LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* 97–123 (2000) (describing anecdotes and statistics regarding fact of, and cause and effects of, financial superiority of married couples to single persons and cohabitants).

⁹³ See *supra* note 32 and accompanying text.

⁹⁴ See *supra* Part IV.B.

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and support for children, regardless of the family form they are born into. Compassion for the needs of others, regardless of their marital status or that of their parents, is a deeply and widely shared American value. But I believe that building a healthy marriage culture in America is also a legitimate concern for family law.

Fortunately, I am not alone in these sentiments. For example, the book *Reconceiving the Family*, critiquing the ALI's *Principles of the Law of Family Dissolution*, has contributions from twenty-seven family law scholars, including two other current or former state supreme court chief justices.⁹⁵ The Institute for American Values, an organization that brings together scholars from across the human sciences and the political spectrum to research the challenges facing families and civil society, recently concluded that "[a] prime goal of marriage and family law should be to identify new ways to support marriage as a social institution, so that each year more children are protected by the loving marital unions of their mother and father."⁹⁶ Moreover, the Georgia Supreme Court recently established a Commission on Children, Marriage, and Family Law⁹⁷ with two important goals: to find ways to reduce both unnecessary divorce and unmarried childbearing. Options include, among other things, court-connected marriage education and divorce intervention programs; remarriage and stepfamily education workshops; marriage education seminars for judges and the family law bar; and a campaign, both in the schools and beyond, to publicize the risks that not having two married parents impose upon children.⁹⁸

⁹⁵ RECONCEIVING THE FAMILY, *supra* note 35, at xvii–xviii (listing Maura D. Corrigan, former Michigan Supreme Court Chief Justice, and Jean Hoefer Toal, South Carolina Supreme Court Chief Justice as contributors). Their pieces are, respectively, Maura D. Corrigan, *A Formula for Fool's Gold: The Illustrative Child Support Formula in Chapter 3 of the ALI's Principles*, in RECONCEIVING THE FAMILY, *supra* note 35, at 409; and Jean Hoefer Toal, *A Response to the Principle's Domestic Partnership Scheme*, in RECONCEIVING THE FAMILY, *supra* note 35, at 425.

⁹⁶ INST. FOR AM. VALUES & INST. FOR MARRIAGE AND PUB. POLICY, *supra* note 38, at 5. Following this Lecture, I joined the board of the Institute for American Values.

⁹⁷ The Georgia Supreme Court Commission on Children, Marriage, and Family Law was established on July 5, 2006. It is co-chaired by Justice P. Harris Hines and me. The Commission's membership includes judges, elected officials of the Georgia General Assembly, educators, members of the family law bar, members of the faith-based community, domestic violence victims advocates, and representatives of the Georgia Division of Family and Children Services. Press Release, Supreme Court of Ga., Supreme Court of Georgia Establishes Commission on Children, Marriage and Family Law (Aug. 29, 2006), available at <http://www.gasupreme.us/familylaw.pdf>. For more information about the Commission, see Ga. Supreme Court's Comm'n on Children, Marriage and Family Law, White Paper 7, <http://www.gasupreme.us/pdf/whitepaper.pdf> (last visited June 2, 2007).

⁹⁸ *Id.* at 9–11.

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Of course, as a judge, my role must be somewhat limited. I should not, and therefore will not, seek to advocate for *specific* changes in the law. I leave this critical task to those in the legislative branch of government. My purpose in pursuing this issue is to try to fix the problem in the judicial system, and to do so I must raise legislative aspirations.

I am also not attempting to foreclose other important legal, moral, and policy debates about equality, poverty, support for children in alternative family forms, unilateral divorce, same-sex marriage, or the prudent expanses or limits of the law. What I am trying to do is add to, not subtract from, the national civic agenda one of the most critical questions of our time: How can law and public policy find new and innovative ways to contribute to creating and sustaining a functioning marriage culture? What can we do differently that would help increase the likelihood that each year more of our children are born and raised in a viable marriage that lasts? I believe that the most important step toward success is defining and creating a consensus around the goal.

What is the alternative to a renewed focus on strengthening marriage? The alternative is to accept as inevitable that some of our children will enjoy a power, protection, and privilege that others, through no fault of their own, are denied. We can no more accept in good conscience an America in which lasting marriage is the preserve of certain classes or ethnic groups than we should accept a situation in which a decent education is limited to a privileged few.

We can do better. We must do better. What we do not yet know how to accomplish, we can learn. Problems, no matter how difficult, must be addressed and not merely endured. Our great nation's commitment to principles of equality, and our concern for all children, require that we undertake the task of renewing marriage in this country in the twenty-first century.